LEGAL DECISION IN A WATER SUPPLY POLLUTION CASE

By J. Walter Ackerman

It was the privilege of the writer last year to read a short paper before the American Water Works Association on a case in court, concerning water pollution.[1] The major points which were given to you were along the lines of what the writer had developed by means of experimental data as to what the effect of the wind was upon the surface currents of a lake.

The main facts of the case were these: The City of Auburn, New York, with a population of about 36,000, takes its water supply from one of the finger lakes of central New York known as Owasco Lake, the drainage area of the same being about 200 square miles, and total length of the lake, 10 miles. The supply drawn for the city comes from the outlet end, and the inlet stream, comprising something like 60 per cent of the total drainage area, enters the lake about 10 miles from the intake crib.

Four miles from the head of the lake is situated the village of Moravia. The Board of Education of that village caused to be constructed a sewer, which led from the High School building to the bank of Mill Creek, one of the tributaries to the inlet stream. This sewer carried the excreta from about three hundred students who attended the school.

The public health law of the State of New York provides that a municipality or corporation furnishing water for domestic supply purposes can secure from the State a promulgation of certain rules and regulations which give to the municipality or corporation furnishing the supply certain police, or restrictive powers, which are supposed to give the water company an opportunity of protecting their water supply.

Section 73 of the general public health law of the State of New York, however, provides, in general, that, when a water company desires certain pollution to be removed from the watershed, the

[1] Water Movement Compared with Air Movement and its Relation to Lake Contamination. *Proceedings*, 1913, pp. 291, etc.

water company must reimburse the property owner for any damage done, and the attorney general has rendered the following opinion:

> In my opinion the proper and only lawful construction which can be placed on Section 73 of the Public Health Law is that all damages and injury to the owner of any property affected by changes required to be made to comply with the rules of the Department of Health must be ascertained and paid prior to the taking possession of the property, and is a prerequisite to the enforcement of said rules in all cases except such as are a nuisance in and of themselves, in which cases the Department of Health would have power and authority outside of Sections 70, 71 and 73 to abate the same.

As the pollution at this High School was one of the most gross, and also the most impersonal one, the water board decided to try it out on its merits. Obviously, from the above, the problem could not be attacked by means of the public health law, as that might necessitate our immediate payment to the parties damaged. And it appeared to the Auburn water department that there was a distinct difference between pollution of this nature and some other acts which constitute a pollution under the rules governing the watershed. That is, the farmer who happened to own land through which passed a stream tributary to our lake, had certain riparian rights which were different from those of the High School. That is, he had purchased his land for the sole and only purpose of carrying on the business of agriculture. Hence, he was entitled to the use of the same, to be used in the usual way of pasturing his cattle, manuring his fields, and any other acts of husbandry which are normally carried on upon a property devoted to farming. And while these ordinary acts might constitute a violation of the rules of our department, and might also cause pollution, if not even infection, of our water supply, the High School was distinctly different. It was not situated originally on a stream, and therefore it lacked the riparian rights which the farmer had, and it created an artificial channel and carried to Mill Creek the excreta from the students attending the same, which if left at the point of the High School, might not, even with the rainfall and washing, have carried the polluting material to Owasco Lake. But owing to the fact that the Board of Education caused to be constructed this sewer, which conveyed the material from a place where no riparian rights whatever existed, to the bank or bed of the stream, this appeared to the Board and its attorneys to be an entirely different situation, and consequently the general ruling of the attorney general did not seem

to fit this particular case. But in order to avoid any complication with the state health law, the problem was attacked under the head of the Penal Code, under sections 1530 and 1532, which are as follows:

Section 1530. Public Nuisance Defined.

A "public nuisance" is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission:

1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or,

2. Offends public decency; or,

4. In any way renders a considerable number of persons insecure in life, or the use of property.

Subdivision 3 does not in any way apply in this case, so it is omitted.

Section 1532. Maintaining Nuisance.

A person who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who wilfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor.

The defendant was indicted by the January, 1911, grand jury, for the crime of maintaining a public nuisance. This indictment contained three counts, and stripped of its legal verbiage, the first count is based upon an alleged offense against public decency, which is the second subdivision of the definition of a public nuisance.

The second count rests on the first subdivision of the definition, which charges a wilful act or omission to perform a duty that annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons. And in this second count there are two things mentioned and complained about: The alleged pollution at the mouth of the sewer, causing poisonous and deleterious odors, and so on; and second, the pollution of the water of Owasco Lake.

So far as the deposit at the mouth of the sewer is concerned, with regard to the smells and odors, the persons harmed by these obviously would be only those who live in the immediate vicinity. The class who are harmed by the pollution of the water, if any, would be those who use Owasco Lake as a source of water supply, like the cottagers along the lake, and of course, more especially the people of Auburn who depend upon Owasco Lake as their source of drinking water.

The third count of the indictment is based upon the fourth subdivision of the definition of a public nuisance, in that it is charged that the conditions render a considerable number of persons insecure in life or the use of property.

After a number of delays, the case was first brought in supreme court, before Mr. Justice William W. Clark, in April, 1913. This was a mistrial, as the jury disagreed. The usual twelfth juror failed to make the other eleven believe in acquittal.

Preparations were again made and the case was brought to trial a second time on March 20 of this year, before the Honorable Arthur E. Sutherland, justice of the supreme court.

On the original trial Professors Mason, Whipple and Winslow were the experts for the people. And they also rendered the same service in the second trial. The people were further aided in the second trial by the addition to this star representation, of Nicholas S. Hill, Jr.

With such experimental data as had been collected by the writer as to time of flow of the stream from Moravia village to the lake, and the surface currents in the lake under influence of wind action, the experts dwelt upon the general principles of the transmission of communicable diseases the prevalence of typhoid fever among the High School students at Moravia and the possibility of typhoid fever carriers, the number of typhoid fever bacilli in fecal matter and in urine, other diseases transmitted through fecal matter, dysentery, children's diseases, etc., life of typhoid fever bacilli in water, and examples of waterborne typhoid fever in other places.

This completed the chain of evidence as to the possibilities of typhoid fever germs to travel from the outlet of the sewer down the inlet and across the lake, a distance of 14 miles, well within the vigorous lifetime of typhoid fever bacilli.

The result of this trial was a verdict of not guilty on the first two counts, and guilty on the third count. This verdict was rendered evidently for the reason that the jury did not care to find that the condition at the opening of the sewer annoyed and injured the comfort and repose of Moravia citizens, because the preponderance of evidence by the people of Moravia showed that no one had ever smelled an odor, and that the sight of the excreta as remaining on the banks of the stream, had not in any way endangered their comfort or repose. In fact, the judge, in discussing informally the points of the indictment with the attorneys in the case, remarked that to the people living in Moravia this appeared to be a geranium bed.

Now, a word as to the code under which this indictment was found:

This is a common law crime, and while the Penal Code, in this exact form, exists in New York State only, the laws of any of the States, with the possible exception of Louisiana, are based upon the same common source, that is, the common law of England. Consequently, there is some law in each and every one of the States of the Union, with the possible exception of Louisiana, that is practically like the one quoted here. In fact, the district attorney in summing up the case, dwelt particularly upon the fact that this is one of the oldest laws known, and might be traced back through generations to England and its common law, and even back to the time of Moses. He also quoted from Deuteronomy 23, 12 and 13, which is as follows:

> Thou shalt have a place also without the camp, whither thou shalt go forth abroad:
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> And thou shalt have a paddle upon thy weapon; and it shall be, when thou wilt ease thyself abroad, thou shalt dig therewith, and shalt turn back and cover that which cometh from thee.

DISCUSSION

MR. NICHOLAS S. HILL, JR.: In many respects the case which Mr. Ackerman has just outlined is one of the most interesting with which the speaker has ever had the good fortune to be connected; not alone because it presented a new method of obtaining relief from pollution of a public water supply, one that the speaker does not know of as having been tried heretofore, but chiefly because the case was so beautifully prepared and put together by the very able attorneys for the city, with the assistance chiefly of Professor Winslow and Doctor Mason. It may be said that in October, November and December of 1907 quite a number of typhoid fever cases were noted in Moravia. The plaintiff, the city of Auburn, brought witnesses to show that certain of these typhoid patients had returned to the high school in February, 1908. These patients of course were presumably carriers, because it is a well-known fact that convalescents from typhoid are usually carriers for a considerable period of time.

Following March 1, 1908, there was a decided thaw, which was traced by the records of rising temperature, and also by the records

maintained by the Auburn Water Department, which showed a rise in the discharge from Owasco Lake. The bacteriological records at the water works in Auburn also showed a sharp and decided rise in the bacterial count; but about this time, or immediately following this thaw, through the experiments carried on by Mr. Ackerman, and which were published in last year's proceedings of the American Water Works Association, there had been established a relation between the wind velocities, wind coefficients or components composing the wind and water movements. The result was that having the records of the United States Weather Bureau giving the velocity and the direction of the wind, we were able to compute with a reasonable degree of accuracy that the wind movements between about the 20th and 26th of March were sufficient to carry the water down Owasco Lake for a distance of sixteen miles, in the time required for pollution to pass from Moravia to the intake. As the lake was only ten miles long there was ample margin for error in the assumptions which have been made. It was also shown that it required only a few days for the sewage to pass from Moravia to the lake. Fifteen days following April 1st there was a marked rise in the typhoid fever rate in the city of Auburn. So the whole case pieces together in a remarkably satisfactory way, a way in which one is seldom able to piece evidence of this kind together; and it was largely because of the coincidence of all these elements in the case that the verdict was obtained.

MR. J. WALTER ACKERMAN: The author's principal reason for giving this short history was that the action was brought under the Penal Code under the head of Nuisances, as that represented an entire departure from the method heretofore followed in seeking and applying remedy for this sort of pollution. While we know not what the future of the case will be, we stand ready and prepared to carry it up as far as they desire it to be carried; so that if the municipality does carry the case up, we will follow it.